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U.S. Citizenship  
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Services

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FILE:

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Office: VERMONT SERVICE CENTER

Date: SEP 12 2006

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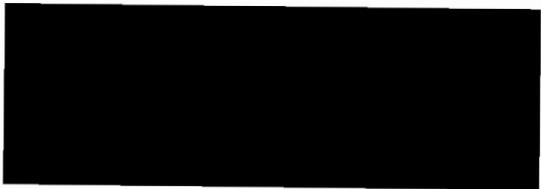
Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

On the petition a box is checked indicating that the proffered position calls for a skilled worker with at least two years of specialized training or experience or a professional with at least a bachelor's degree. The Form ETA 750, however, states that the position requires no education or experience and only one month of training. Subsequently, in response to a CIS inquiry, the petitioner indicated that the petition should be considered as a petition pursuant to Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). The petition will therefore be analyzed as one calling for an unskilled worker, that is, a position open to workers with less than two years of training or experience.

The petitioner is a hazardous materials abatement contractor. It seeks to employ the beneficiary permanently in the United States as an asbestos handler. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor accompanied the petition. The acting director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$23.15 per hour, which equals \$48,152 per year.

The petition in this matter was submitted to CIS on November 18, 2002. On the petition, the petitioner stated that it was established on July 10, 1997 and that it employs "15+" workers. The petition does not state the

petitioner's gross annual income in the space provided, but states that its net annual income is \$315,185.<sup>1</sup> On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in New Rochelle, New York.

In support of the petition, counsel submitted a copy of the petitioner's compiled 2001 financial statements. Counsel submitted no other evidence in support of the petitioner's ability to pay the proffered wage.

Because the evidence submitted was insufficient, pursuant to 8 C.F.R. § 204.5(g)(2), to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on September 30, 2003, requested, *inter alia*, additional evidence pertinent to that ability. The service center also noted that the petitioner has submitted 17 petitions for alien workers,<sup>2</sup> and stated that, in order for the petition to be approvable, the petitioner must demonstrate the ability to pay the proffered wage of all of the aliens for whom it has petitioned.

The service center specifically requested 2001 and 2002 tax returns or audited or reviewed financial statements, the 2001 and 2002 W-2 Wage and Tax Statements and Form 1099 miscellaneous income statements of all of the petitioner's employees, and the petitioner's 2001 and 2002 W-3 transmittals. The service center specifically stated that if the petitioner employed the beneficiary during 2001 or 2002 it should provide the 1099 or W-2 forms showing amounts it paid to the beneficiary during those years.

In response, counsel submitted the petitioner's 2001 and 2002 Form 1120-A U.S. Corporation Short-Form Income Tax Returns. Those returns show that the petitioner is a corporation, that it incorporated on July 10, 1997, and that it reports taxes pursuant to cash convention and the calendar year.

The 2001 return shows that the petitioner declared taxable income before net operating loss deductions and special deductions of \$11,078 during that year. The Balance Sheet per Books included in that return shows that at the end of that year the petitioner's current liabilities greatly exceeded its current assets.

The 2002 return shows that the petitioner declared taxable income before net operating loss deductions and special deductions of \$104,230 during that year. The Balance Sheet per Books included in that return shows that at the end of that year the petitioner's current liabilities greatly exceeded its current assets.

Counsel also provided the petitioner's 2001 and 2002 W-3 transmittals showing that the petitioner paid total wages of \$418,527.45 and \$259,572<sup>3</sup> during those years, respectively.

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<sup>1</sup> Tax returns subsequently submitted do not support that statement of the petitioner's net income.

<sup>2</sup> Subsequently the director stated that the petitioner has 16 petitions pending.

<sup>3</sup> The petitioner indicated, on the Form I-140 petition submitted on November 18, 2002, that it employed "15+" workers. The petitioner's total 2002 wage expense divided between 15 workers would equal a mean annual wage during that year of \$17,304.80.

In a letter dated December 8, 2003 counsel stated that the petitioner declined to provide the requested W-2 forms based on confidentiality concerns.<sup>4</sup>

The acting director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on August 16, 2004, denied the petition.

On appeal, counsel submits a Form I-290B appeal and a brief.

On the Form I-290B appeal counsel cites an unpublished, non-precedent decision of this office for the proposition that the petitioner's depreciation deduction and end-of-year cash should be added to its taxable income before net operating loss deductions and special deductions for the purpose of determining its ability to pay the proffered wage during a given year. In the brief counsel reiterates the same argument.

Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. This office will address the issues raised by counsel, but counsel's citation of a non-precedent decision is of no effect.

Counsel also states on that form appeal that,

. . . [CIS's] contemplation on [sic] the employer's ability to hire 16 potential workers through different labor certification [sic] is highly speculative and is based upon a total void of supporting statutes or case law.

In the brief counsel reiterates and clarifies that additional argument, stating that neither the statutes nor the regulations allow CIS to look at the total number of petitions filed by the same petitioner to determine whether a single petition establishes the financial ability to pay. Counsel states that the decision of denial is based on the assumption that all of the 16 beneficiaries for whom the petitioner has filed petitions will eventually work for the petitioner, and characterizes that assumption as speculative.

Counsel urges that the decision in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) indicates that a petition can be approved even though a petitioner's net income was less than the annual amount of the proffered wage during a given year. *Matter of Sonogawa, supra*, however, relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more profitable or successful years. During the year in which the petition in that case was filed the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

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<sup>4</sup> Pursuant to 8 C.F.R. § 103.2(b)(14) CIS may deny a petition if the petitioner fails to provide requested evidence that is relevant to a material issue. The petitioner is not claiming to have paid wages to the beneficiary during the salient years. Therefore, what issue would be clarified by the requested W-2 forms, given that the W-3 transmittals were provided, is unclear. Further, the service center did not rely upon this issue in denying the petition. This office, therefore, declines to base today's decision, in whole or in part, on the petitioner's failure to provide the requested W-2 forms.

In *Sonegawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

Finally, counsel implies that the annual amount of the proffered wage during 2001 should be prorated for the period from the April 30, 2001 priority date to the end of the year, and asserts that the petitioner had net current assets in excess of the pro-rated amount at the end of 2001. Counsel cites figures from the petitioner's compiled financial statements in support of that assertion.

Counsel's assertion that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost or other basis of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.<sup>5</sup> Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.

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<sup>5</sup> Counsel does not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages.

Counsel urges that the petitioner's Schedule L Cash should be added to its net profits in calculating the funds available to the petitioner to pay the proffered wage. That calculation would be inappropriate. Some portion of the petitioner's revenue during a given year is paid in expenses and the balance is the petitioner's net profit. Of its net profit, some may be retained as cash. Because the petitioner's Schedule L cash may be derived from its net profit, adding the petitioner's Schedule L Cash to its net profit would likely be duplicative, at least in part.

Counsel's reliance on the compiled financial statements submitted is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel argues that CIS is unable, pursuant to the regulations governing ability to pay the proffered wage, to take notice of the fact that a petitioner has multiple petitions pending. The regulations require the petitioner to show the ability to pay the proffered wage. If CIS is aware of other pending petitions, CIS must, in order to determine the petitioner's ability to pay the instant beneficiary's wages, take into account any and all other wage obligations that could possibly result from the other pending petitions in order to determine whether the job offer is credible. As an example, a petitioner with \$25,000 in net profits cannot show the ability to pay the wages of an infinite number of workers at \$25,000 each per annum nor, in fact, more than one. Thus the regulations require CIS to take notice of other pending petitions when evaluating the petitioner's ability to pay the proffered wage.

Counsel asserts, however, that the finding that the petitioner has failed to show its continuing ability to pay the proffered wage beginning on the priority date rests on the speculative assumption that the petitioner will ultimately hire all of the beneficiaries for whom it has petitioned. This office declines to speculate as to the number of beneficiaries the petitioner will hire. It does not assume the petitioner will hire all of its beneficiaries nor does it assume that it will not. Nevertheless, the petitioner has filed other petitions and asserted its ability to pay each beneficiary. Nevertheless, the petitioner has filed other petitions and asserted its ability to pay each petition's beneficiary. Unless the petitioner withdraws all of the petitions before CIS save for this one, however, it is obliged to show the ability to pay the proffered wage to all of the beneficiaries of its pending petitions.

Counsel requests that CIS prorate the proffered wage during 2001 for the portion of the year that occurred after the priority date. This office will not, however, consider 12 months of income towards an ability to pay a proffered wage during some shorter period any more than we would consider 24 months of income towards paying the annual amount of the proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically<sup>6</sup> shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The petitioner seeks to have this office consider the petitioner's net current assets as computed from figures on its compiled financial statements. As was noted above, compiled financial statements are the

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<sup>6</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

representations of management compiled into standard form. Compiled financial statements and the figures on them are, therefore, insufficient to sustain the burden of proof.

The proffered wage is \$48,152 per year. The priority date is April 30, 2001.

From the priority date to the date of this decision the petitioner has submitted at least two petitions upon which no action has been taken and submitted appeals in six other cases, which appeals have not yet been decided.<sup>7</sup> The petitioner is obliged to show that it is able to pay the wages of all the beneficiaries for whom it has petitions pending. The petitioner did not provide information pertinent to those other cases, such as the amount of the wages proffered to the other beneficiaries. This office does not have that information readily at its disposal. As a result, even if the petitioner were able to show the ability to pay the wages proffered to the instant beneficiary, the matter would be remanded for information pertinent to the wages proffered in those other pending cases. That issue is moot, however, given the analysis below.

During 2001 the petitioner declared taxable income before net operating loss deductions and special deductions of \$11,078. That amount is insufficient to pay even the wage proffered to the instant beneficiary. The Balance Sheet per Books included with the petitioner's income tax return shows that it ended the year with negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence to demonstrate the availability of any other funds to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared taxable income before net operating loss deductions and special deductions of \$104,230. Although that amount is sufficient to pay the wage proffered to the beneficiary of the instant petition, it is insufficient to pay the wage proffered to the beneficiaries of all of the petitions<sup>8</sup> the petitioner has pending before CIS. The petitioner cannot, therefore, demonstrate its ability to pay the proffered wage with its net profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has submitted no reliable evidence to demonstrate the availability of any other funds to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petition in this matter was submitted on November 18, 2002. On that date the petitioner's 2003 tax return was unavailable. The request for evidence in this matter was issued on September 30, 2003. On that date the petitioner's 2003 tax return was still unavailable. The petitioner is excused, therefore, from providing evidence of its ability to pay the proffered wage during 2003 and subsequent years.

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<sup>7</sup> In the decision of denial the director stated that 16 petitions were pending, which counsel admitted in his brief. Only eight petitions appear to be pending now. However, eight additional petitions have been denied, thus accounting for the difference between the number pending stated in the decision and the number now pending.

<sup>8</sup> Although the amount of the wages proffered in those other cases is not readily available to this office, this office takes note that the petitioner has not demonstrated its ability to pay the annual wages proffered in the instant case as well as the wages of the additional eight beneficiaries for whom petitions are now pending out of its 2002 taxable income before net operating loss deductions and special deductions of \$104,230.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.